Filed 4/19/10 P. v. Clayton CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARTY JOE CLAYTON, Defendant and Appellant.	F057112 (Super. Ct. No. PCF215002) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Ronn M. Couillard, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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*Before Wiseman, A.P.J., Gomes, J., and Hill

On January 2, 2009,[1] appellant Marty Joe Clayton, pursuant to a plea agreement, pled no contest to second degree burglary (Pen. Code, §§ 459, 460, subd. (b)).[2] That same day, the court placed appellant on three years' probation, with various terms and conditions, including that appellant serve 90 days in county jail. The court awarded appellant eight days of presentence credit, consisting of six days of actual time credit and two days of conduct credit.

Appellant's appointed appellate counsel has filed an opening brief which summarizes the pertinent facts, with citations to the record, raises no issues, and asks that this court independently review the record. (*People v. Wende* (1979) 25 Cal.3d. 436.) Appellant has not responded to this court's invitation to submit additional briefing. However, as we discuss below, we will deem raised, without additional briefing, the contention that appellant is entitled to additional conduct credit under a 2010 amendment to section 4019. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Facts

At the hearing at which appellant entered his plea, the parties stipulated that there was a factual basis for the plea, based on a Porterville Police Department crime report. According to that report, Porterville Police Officer A. Sutherland, while investigating a report of a burglary shortly after midnight on December 28, 2008, made contact with appellant, who had been detained by another officer, and appellant stated the following:

Appellant and his younger brother, a minor indentified in the report as the "confidential juvenile" (CJ), were walking along Henderson Avenue in Porterville when

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1 Except as otherwise indicated, all references to dates of events are to dates in 2009.

2 All statutory references are to the Penal Code.

the CJ stated he needed to use the bathroom. The CJ "walked around the corner," at which point appellant "heard [a] window smash." Appellant "just stood there while the [CJ] was inside the business." Shortly thereafter, the CJ "exited the business" and stated, "'let's get out of here' ...."

The pair continued walking along Henderson Avenue until they came to a "building complex." The CJ "went behind the building" and appellant "heard the window smash again." Appellant "believed that the [CJ] was breaking into another business." The CJ returned shortly thereafter, and the pair continued walking along Henderson Avenue. Eventually, they were stopped by a police officer.

Procedural Background

On January 12, appellant appeared in court, apparently unrepresented by counsel; indicated he had "placed [himself] on calendar"; and stated he wanted to withdraw his plea. The court set a hearing for February 2 in the department in which appellant had entered his plea.

On February 2, appellant appeared in that department. The court took the matter off calendar and advised appellant his motion to withdraw his plea had to be presented by his attorney and that appellant should contact his attorney if he wished to bring such a motion.

According to the "Settled Statement of Fact" filed in the trial court on September 15, the following occurred on February 26 at an unreported hearing: Appellant's attorney "indicated he had not filed a Motion to Withdraw Plea because the defendant was asserting that [appellant's attorney] had 'given him bad advice' ...." Appellant's counsel further stated "he would contact the Conflict Attorney's Office to have another attorney confer with the defendant and file any motions," and he "agreed to advise the defendant that another attorney would have to file any motions to withdraw the plea and that another attorney would be in contact with him."

Nothing further appears in the record regarding appellant's expressed wish to withdraw his plea.

On February 27, appellant filed a timely notice of appeal in which he requested that the court issue a certificate of probable cause. On March 2, the court denied that request.

DISCUSSION

Under section 2900.5, a person sentenced to state prison for criminal conduct is entitled to credit against the term of imprisonment for all days spent in custody before sentencing. (§ 2900.5, subd. (a)). In addition, section 4019 provides that a criminal defendant may earn additional presentence credit against his or her sentence for willingness to perform assigned labor (§ 4019, subd. (b)) and compliance with rules and regulations (§ 4019, subd. (c)). These forms of section 4019 presentence credit are called, collectively, conduct credit. (*People v. Dieck* (2009) 46 Cal.4th 734, 939, fn. 3.)

The court sentenced appellant in January 2009, and calculated appellant's conduct credit in accord with the version of section 4019 then in effect, which provided that conduct credit could be accrued at the rate of two days for every four days of actual presentence custody. (Former § 4019.) However, the Legislature amended section 4019 effective January 25, 2010, to provide that any person who is not required to register as a sex offender and is not being committed to prison for, or has not suffered a prior conviction of, a serious felony as defined in section 1192.7 or a violent felony as defined in section 667.5, subdivision (c), may accrue conduct credit at the rate of four days for every four days of presentence custody.

This court, in its "Order Regarding Penal Code section 4019 Amendment Supplemental Briefing" of February 11, 2010, ordered that in pending appeals in which the appellant is arguably entitled to the benefit of the more generous conduct credit accrual provisions of the 2010 amendment to section 4019, we would deem raised,

without additional briefing, the contention that prospective-only application of the amendment is contrary to the intent of the Legislature and violates equal protection principles. We deem these contentions raised here.[3]

As this court explained in the recent case of *People v. Rodriguez* (2010) 182 Cal.App.4th 535, mod. (Mar. 30, 2010; F057533) ___ Cal.App.4th ___, the 2010 amendment to section 4019 does not operate retroactively and does not violate the constitutional guarantee of equal protection of the laws. Appellant is, therefore, not entitled to additional conduct credit under that amendment.

Following independent review of the record, we have concluded that no reasonably arguable legal or factual issues exist.

DISPOSITION

The judgment is affirmed.

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3 We assume without deciding that appellant is not required to register as a sex offender and has not suffered a prior conviction of a serious or violent felony.